Fair Political Practices Commission

To: Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh, and Remy

From: Lawrence T. Woodlock, Senior Commission Counsel
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Subject: Adoption of Regulations 18521.5 and 18421.8, and Amendment of Regulation 18401, re: Ballot Measure Committees Controlled by Candidates for Elective State Office

Date: December 31, 2008

Proposed Commission Action and Recommendation: Adopt Regulation 18521.5, which will establish rules for the permissible use of funds contributed to candidates for elective state office for use in ballot measure campaigns, clarify the application of contribution limits to these committees in some cases, and require that a ballot measure committee controlled by a candidate for elective state office be named in a manner that clearly indicates that it is a ballot measure committee controlled by the named candidate. Staff also recommends the Commission adopt a companion Regulation 18421.8, and a related revision to Regulation 18401, imposing additional disclosure and record-keeping rules for expenditures of $100 or more by a general purpose ballot measure committee controlled by a candidate for elective state office. These regulations, if adopted, will be effective after filing with the Office of Administrative Law and the Secretary of State, approximately two months after the date of this meeting. They will therefore be applied by committees for the quarter ending March 31, 2009.

Background: Proposed Regulation 18521.5 is largely a codification of longstanding Commission advice on the management of ballot measure committees controlled by candidates for elective state office (hereafter simply "candidates"). Since the passage of Proposition 73 in 1988, the Commission has advised that Section 85201 (the "one bank account rule") requires that funds solicited by a candidate for use in ballot measure advocacy be placed in a committee separate and distinct from the candidate's committee for elective office. Limits on contributions to candidate election campaigns (now at Sections 85301 et seq.) increase pressure to fund these campaigns from resources not subject to limits – in short, to find ways to circumvent the contribution limits. The Commission accordingly has advised that funds contributed to candidate controlled ballot measure committees may not be used to influence candidate election campaigns. New reporting and naming rules are also added in the proposed regulation to advance the fundamental goal, which is to ensure that ballot measure funds are spent by candidates on ballot measure activities.

Candidate-controlled ballot measure committees have coexisted for decades alongside candidates' committees for elective office. Almost twenty years ago the Commission recognized that money raised and spent to fund ballot measure campaigns must be treated differently from money deposited into accounts that fund campaigns for elective office. When campaigns for elective office were subject, under Proposition 73, to contribution limits that did not apply to

money given for ballot measure campaigns, the Commission acted. The *Leidigh* Advice Letter, No. A-89-358, warned that money raised to oppose a measure free of contribution limits could not be used to support or oppose candidates in other contests.

After Proposition 73's limits were enjoined in 1990, the Commission reaffirmed its view on the requirement that funds contributed to ballot measure contests be deposited and regulated separately from contributions to election committees. The *Weems* Advice Letter, No. A-91-448, reasoned that the Act's "one bank account rule" could have meaningful effect only if a committee raising funds for a ballot measure contest was required to deposit those funds in a bank account separate from the account established for the candidate's controlled election committee. Thus:

> "In addition to candidate controlled campaign committees, the Commission has created a narrow exception with respect to candidate controlled ballot measure committees. (Citations omitted.) Such committees may raise contributions to support or oppose ballot measures; these candidate controlled ballot measure committees may not, however, make contributions to support or oppose candidates."

At present, Section 85201 still requires that ballot measure funds not be commingled with monies deposited into candidates' (re)election committees. Proposition 34's contribution limits, at Sections 85301 et seq., add urgency to this mandate, requiring that the Commission (again) be vigilant against attempts to circumvent these contribution limits.

Candidates now commonly control four kinds of recipient committees, as that term is defined at Government Code Section 82013(a).[1] Ballot measure committees pose the greatest threat to candidate contribution limits because ballot measure committees tend to attract the largest individual contributions – there have been several instances of contributions to candidate controlled ballot measure committees in excess of one million dollars from individual sources.

Recent newspaper accounts highlight the freedom with which ballot measure funds are presently moved about to serve purposes unrelated to ballot measure campaigns. A May 5, 2008, article in the Sacramento Bee, augmented by a note published later that day in the Bee's Capitol Alert, described a legislator preparing to assume a leadership position who did not then control a ballot measure committee – but expected to do so soon. This elected official was quoted as explaining: "Certainly when I become the leader and responsible for the election and reelection of my [Party] colleagues I am going to want all the legitimate tools at my disposal to do the job." The committee was formed soon after the story was published. It spent $115,000 on ballot measures, and transferred $30,000 to the Party.

[1] The three types of candidate-controlled recipient committees already subject to specific regulations are: (1) campaign committees, covered by Regulation 18521; (2) legal defense funds, treated in Regulation 18530.4 and; (3) officeholder accounts, governed by Regulation 18531.62.

A Bee article on December 12, 2008, described the transfer by another legislator of $1.5 million "ostensibly raised for the [Proposition 11] campaign to a personal legal defense fund." A second transfer was reported on December 22. The $1.9 million shifted from this committee to the Legal Defense Fund is twelve times the amount the committee spent on the ballot measure. The point of these articles is that candidates simply do not regard themselves as bound to spend ballot measure funds on ballot measures, and may believe it is "legal" to use this money to support candidate election campaigns.

Newspaper accounts of this kind alert the public to the relative freedom with which funds in ballot measure accounts may be diverted to other purposes by candidates who control them. Current reporting rules facilitate these activities by making it difficult to "follow the money" that flows through candidate controlled ballot measure committees. It is no simple matter even to identify such committees. At present, nearly all general-purpose ballot measure committees controlled by candidates for elective state office bear names that identify themselves *neither* as candidate controlled committees, *nor* as ballot measure committees. When such a committee is identified, it is often difficult or impossible to determine the uses to which its funds were put, except in cases where the name of the payee makes this information self-evident.

In addition to Regulation 18521.5, staff proposes a companion Regulation 18421.8, and a related revision to Regulation 18401. Regulation 18421.8 will impose additional disclosure rules on general purpose ballot measure committees controlled by candidates for elective state office reporting expenditures under the Act. More specifically, the proposed regulation will require these committees to identify each ballot measure, or to describe the nature or purpose of each potential ballot measure, on which an expenditure of $100 or more has been made. The revision to Regulation 18401 helps ensure compliance with Regulation 18421.8 by requiring that the committee maintain the information mandated by Regulation 18421.8 in a dated memorandum preserved in the committee's records.

Elections Code Section 18680 imposes a "trust" on ballot measure funds, a broad rule originally meant to ensure that money raised for a ballot measure campaign is not diverted to the personal use or benefit of those who raised the money. A rule advancing interests peculiar to the Political Reform Act (for example, the Act's "one bank account rule" and the contribution limits) must necessarily go beyond the Elections Code. Staff believes that strengthening application of the "trust" provision of Elections Code Section 18680 supports, rather than conflicts with, the fundamental purpose of Elections Code Section 18680. But the Act will prevail even if there were a conflict. Section 81013 provides: "If any act of the Legislature conflicts with the provisions of this title, this title shall prevail."

Voters approved Proposition 34's contribution limits on candidates for elective state office to lessen the influence, or the perceived influence, of wealthy campaign donors. But those same donors can – and sometimes do – contribute amounts over $1 million to ballot measure committees controlled by candidates who regard such committees as critical to their political success, and as a repository of funds that may be transferred at will for matters unrelated to a ballot measure. Any influence that donors to a candidate's election committee might hope to

gain can be greatly increased by further, unlimited contributions to the candidate's ballot measure committee(s). Rules that limit the "flexibility" of these ballot measure committees to their ostensible purpose will bring about a commensurate reduction in the importance of these large donors, and the real or perceived influence they may wield over public business.

The December Commission Meeting: At the December meeting, some representatives of the regulated community argued that California had no interest, or no interest sufficient to withstand legal challenge, in alleviating popular concerns over the influence of wealthy donors on their elected officials. Other representatives of the regulated community disagreed on this point, and staff's supporting Memorandum illustrated the Supreme Court's recognition of the same state interest, which the high court reiterated many times following its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976). The Commission indicated that it was satisfied California had a legally sufficient interest in addressing the problems described by staff, but asked staff to return in January with a regulation responsive to other objections.

Most of these objections originated in the requirement of the regulation, as originally drafted, that these ballot measure committees be organized as "primarily formed" committees. This meant that candidates who were not measure proponents could not always open a controlled ballot measure committee as early as they might like, a restriction which they claimed was not authorized under the Act, and violated their constitutional rights insofar as such a requirement could place them at a disadvantage relative to other participants in ballot measure campaigns.

The Commission expressed its concern that limiting candidate controlled ballot measure committees to *primarily formed* committees might indeed present too many practical and legal difficulties. Therefore the revised regulation does *not* require that these committees be primarily formed. The focus has shifted instead to the fundamental safeguards relating to disclosure (committee naming and reporting conventions), and limits on the use of committee funds for purposes unrelated to a ballot measure campaign, similar to provisions that appeared in the prior draft of the regulation. The current proposal also retains its codification of the teaching of *Citizens to Save California* regarding the imposition of contribution limits on ballot measure committees that make certain expenditures directed at campaigns for elective state office.[2]

Staff believes that the regulation as currently proposed is needed to ensure, at a minimum, that money given to ballot measure committees controlled by candidates for elective state office is used to support or oppose ballot measures, not as campaign "warchests" that can be diverted to bankroll candidate campaigns, or legal defense committees, or other projects, and that the public be able to identify and monitor the activities of these committees.

The proposed regulation will limit the use of funds solicited by candidates for ballot measure advocacy to the ostensible purpose of the committee – ballot measure advocacy.

[2] *Citizens to Save California, et al. v. FPPC,* 145 Cal.App. 4th 736 (2005).

Yet the Commission should be concerned not only with episodic instances of misused funds that gain wide publicity, but with the stories that go unreported due to difficulties in uncovering the use of funds by candidate controlled ballot measure committees.

Of all ballot measure committees controlled by candidates for elective state office, nearly two thirds are general purpose committees whose names offer no indication that they are ballot measure committees, still less that they are controlled by candidates.[3] This widespread practice conceals the nature and purpose of these committees, erecting a preliminary barrier to obtaining basic information on the flow of money through these committees, which the proposed regulation will cure.[4] Because the proposed regulation no longer requires that ballot measure committees be "primarily formed," the temporal limitations imposed by the prior draft of this regulation have been eliminated.

The Provisions of Regulation 18521.5:

Subdivision (a) – Committee Names

Subdivision (a)(1) requires that a general purpose ballot measure committee controlled by a candidate for elective state office include the name of the controlling candidate and indicate that it is a ballot measure committee. A committee can "indicate" this by including in the name the words "ballot measure committee," or by including in the name the official ballot designation or a description of measure(s) or proposed measure(s) the committee will support or oppose. Subdivision (a)(2) points to the additional information required of primarily formed committees.

Subdivision (b) – Information Required on the Statement of Organization

Subdivision (b)(1) requires committees to identify on their Statement of Organization any measure or measures on which the committee has spent, or anticipates spending, a total of $50,000 or more in the two-year election cycle. The prior version of this regulation required identification of *all* measures that the committee would support or oppose. This revision answers objections that it would be burdensome to amend the Statement of Organization each time a committee made any expenditure to support or oppose a ballot measure not already identified on the Statement of Organization. Staff believes that an investment of $50,000 or more reflects a substantial commitment to a measure that should be noted on the Statement of Organization and, by implication, that a lesser commitment need not be noted if the committee finds it burdensome to do so. Subdivision (b)(2) requires simply that the Statement of Organization be updated to reflect the official name of a measure not available when the initial $50,000 was spent.

[3] "Strengthening CaliforniaThrough Leadership," "Believing in a Better California," and "Alliance for California's Renewal" are typical examples.

[4] Regulations 18421.8 and 18401, also before the Commission, assist in this disclosure function by requiring that the purpose of many expenditures, currently not identified, be disclosed in the campaign reports filed periodically by ballot measure committees.

Subdivision (c) – Contribution Limits

Subdivision (c) is declaratory of existing law. *Citizens to Save California, et al. v. FPPC* (145 Cal.App. 4th 736) held that the Act does not generally authorize contribution limits on candidate controlled ballot measure committees, but some candidates may not realize that these committees are nonetheless subject to a contribution limit under circumstances specified by Section 85310, so a statement relating to the application of Section 85310 seems advisable. The contribution limit will apply when a candidate for elective state office is "clearly identified" in communications disseminated, broadcast, or otherwise published by the committee within 45 days of an election. Regulation 18531.10(a)(1) states, of course, that a candidate is *not* "clearly identified" merely because his or her name appears in the committee name as required by law "and the candidate is not singled out in the manner of display."

Subdivision (d) – Committee Expenditures

Subdivision (d)(1) states the general rule that these ballot measure committees may make expenditures only on activities related to a state or local measure or potential measure, offering examples of permissible committee expenditures. Subdivisions (d)(2) and (3) provide specific exceptions to the general rule.

Subdivision (e) – Compliance with Reporting and Recordkeeping Rules is self-explanatory.

Subdivision (f) – Express Provisos

The general rule of Subdivision (d) – that committee funds shall be used only to make expenditures related to a measure or potential measure – might not entirely preclude transfers to candidate campaign committees ostensibly to fund ballot measure expenditures by the candidate. Subdivision (f)(1) makes it clear that funds from candidate controlled ballot measure committees may not be transferred to a candidate's campaign committee for any asserted reason. Paragraph (2) emphasizes that personal use restrictions apply to expenditures made by candidate controlled ballot measure committees, and Paragraph (3) stresses that this regulation is not to be construed to permit any use of funds in violation of Elections Code Section 18680.

Attachments:
Regulation 18521.5, 18421.8, 18401